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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMES PAUL FRALEY, Defendant and Appellant.	E048518 (Super.Ct.No. INF061042) OPINION

APPEAL from the Superior Court of Riverside County. Randall Donald White, Judge. Affirmed.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia, and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

On June 24, 2008, the Riverside County District Attorney filed a single-count information charging defendant and appellant James Paul Fraley with burglary under Penal Code section 459. The district attorney also alleged that defendant had serious and violent prior convictions in 1992 for robbery (Pen. Code, § 211), and in 1988 for arson (Pen. Code, § 451d), that came within the meaning of Penal Code sections 667, subdivisions (c) and (e)(1), and 1170.12, subdivision (c)(1). The district attorney further alleged that defendant's prior convictions in 2001 for grand theft auto (Veh. Code, § 10851), in 1992 for robbery (Pen. Code, § 211), and in 1991 for burglary (Pen. Code, § 459) came within the meaning of Penal Code section 667.5, subdivision (b). Defendant was arraigned on the information and pleaded not guilty.

After a jury trial, on December 15, 2008, the jury convicted defendant of burglary. Defendant then waived his right to a jury for the prior conviction allegations. After a bifurcated proceeding, the trial court found the prior conviction allegations to be true.

On May 28, 2009, prior to sentencing, the trial court heard and denied defendant's motion under Penal Code section 1385 to strike the prior strike convictions. The trial court sentenced defendant under the three strikes law to an indeterminate term of 25 years to life in prison. The trial court imposed consecutive one-year terms for each of defendant's three prior convictions in 1991, 1992, and 2001.

On appeal, defendant contends that the trial court abused its discretion in denying his motion to strike one or both of his prior strike convictions. Defendant also contends

that the three strikes sentence imposed by the trial court violates his state and federal constitutional rights. For the reasons set forth below, we shall affirm the judgment.

I

FACTUAL AND PROCEDURAL HISTORY

In 2008, Juan Carlos DeLeon Arambula (victim) owned a restaurant, "Casa Blanca," in Desert Hot Springs. On February 14, 2008, about 7:30 a.m., a cook at the restaurant contacted the victim and informed him that there had been a break-in. The victim told the cook to call the police and then went to the restaurant.

The victim arrived at the restaurant about one-half hour later. There, he inspected the premises while waiting for the police to arrive. The victim noticed that the cash register was missing and the front-door lock was broken. Cement or plaster from around the door had been removed; it was on the ground. The wood of the door appeared to have been pried and was also damaged.

The victim's restaurant was equipped with security cameras that surveilled the restaurant. The nighttime recording device was motion sensitive. The victim watched the video captured by the surveillance camera. The video images depicted defendant breaking into the restaurant and attempting to open the cash register. When defendant could not open the register, he removed it and carried it out.[1]

[1] The surveillance video was played for the jury.

Around 8:30 a.m., Desert Hot Springs Police Officer Michael Chilner responded to the restaurant.[2] The officer observed signs of forced entry into the restaurant. Officer Chilner viewed the video images captured by the surveillance camera. The officer copied the video images onto a CD. He contacted Desert Hot Springs Police Officer Gustavo Paiz to clarify the suspect's identity. Officer Paiz arrived at the restaurant and viewed the video images. Officer Paiz recognized defendant as the suspect in the images because he recognized defendant's "distinct" hairline. Officer Paiz was familiar with defendant from prior police contacts within two years from the date of the break-in at the restaurant.

After Officer Paiz identified defendant in the images, he went to the police station and viewed other photographs depicting defendant. Thereafter, the officer confirmed defendant's identification through his facial features and unique hairstyle.

Defendant's girlfriend, Shannon Hansel, testified on defendant's behalf. Hansel stated that on February 13, 2008, she was at her residence with defendant. About 10:00 p.m., Hansel stated that she left with defendant to go to his friend's house in another part of town. Hansel testified that defendant worked on his friend's computer all night. They left about dawn and returned to her residence.

[2] At the time of the offense, Officer Chilner was employed by the City of Desert Hot Springs as a community service officer. His duties included creating intake reports and responding to calls not involving suspects at the scene of the incident.

II

DISCUSSION

A. Motion to Strike One or Both Prior Strike Convictions

Defendant contends that the trial court abused its discretion in denying defendant's motion to strike one or both of his prior strike convictions and imposing a sentence under the three strikes law.

1. Background

On April 27, 2009, defense counsel filed a motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), requesting that the trial court exercise its discretion under Penal Code section 1385 and strike one or both of defendant's prior strike convictions.

At the hearing on the motion on May 28, 2009, defense counsel argued that the facts of the current offense, commercial burglary, were not violent since the restaurant was closed and no one was present when defendant broke in and removed the cash register. Counsel pointed out that the offense lacked sophistication, the amount of cash in the register was about $100, and the damage related to the theft was minimal. Moreover, counsel asserted that defendant was cooperative during his arrest.

Additionally, defense counsel argued that defendant's prior strike convictions were remote in time. Although defense counsel conceded that the 1992 robbery was a violent crime, he stated that it was committed as a result of defendant's heroin addiction. As for the other convictions, defense counsel argued that defendant's last offense was

committed in 2001, and that from 1987 through 2001, defendant's offenses were minor. Additionally, defense counsel argued that defendant's numerous "administrative" parole violations should not be taken into consideration in a three strikes case.

Furthermore, defense counsel argued that defendant fell outside the three strikes law because he was the product of a broken home and had unstable familial relationships. Counsel pointed out that defendant had demonstrated his ability to turn his life around by earning a general education degree and taking classes while incarcerated. Counsel stated, "[i]t would cost the taxpayers a significant amount of money to warehouse [defendant] for the rest of his life."

The prosecution argued that defendant has refused to take responsibility for his action related to the current offense, and insists he is innocent despite the jury's verdict. The prosecution discussed defendant's lengthy criminal history and argued he was a recidivist within the spirit of the three strikes law.

The trial court stated that it had read and considered the papers submitted by the parties, arguments of counsel, and the probation officer's report. Thereafter, the court denied defendant's motion.

2. Applicable Law

The trial court's decision to dismiss or not to dismiss a prior strike allegation is reviewable on appeal under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 373-375 (*Carmony*).) Under this standard, the

defendant has the burden of establishing that the trial court's determination was arbitrary or irrational. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

In *Carmony, supra,* 33 Cal.4th 367, the California Supreme Court explained that "the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Id*. at p. 378.) In light of this presumption, an abuse of discretion in declining to dismiss a strike occurs only in "limited circumstances." (*Ibid*.) For example, where the trial court "was not 'aware of its discretion' to dismiss"; "where the court considered impermissible factors in declining to dismiss"; where application of the sentencing norms established by the three strikes law produces an "'"arbitrary, capricious or patently absurd" result' under the specific facts of a particular case"; or "where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme," that is, where the relevant factors "manifestly support the striking of a prior conviction and no reasonable minds could differ . . . ." (*Ibid*.) Discretion is also abused when the trial court's decision to strike or not to strike a prior is not in conformity with the "spirit" of the law. (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

"Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the

continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Carmony, supra,* 33 Cal.4th at p. 378, quoting *People v. Strong* (2001) 87 Cal.App.4th 328, 338.)

The touchstone of the analysis must be "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams, supra,* 17 Cal.4th at p. 161; see also *People v. Garcia* (1999) 20 Cal.4th 490, 498-499.) A decision to dismiss a strike allegation based on its remoteness in time is an abuse of discretion where the defendant has not led a life free of crime since the time of his conviction. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.)

3. Analysis

Defendant claims the trial court abused its discretion in denying his motion to strike one or both of his prior strike convictions because of the nonviolent nature of the current offense, the remoteness of the prior convictions, the nonviolent nature of the other prior offenses, and his background and prospects.

In this case, the trial court denied defendant's motion, and in light of the above noted factors, we conclude that the trial court did not abuse its discretion in doing so. The relevant considerations supported the trial court's ruling, and there is nothing in the

record to show that the court declined to exercise its discretion on improper reasons or that it failed to consider and balance the relevant factors, including defendant's personal and criminal background. In fact, the record clearly shows the court was aware of its discretion, aware of the applicable factors a court must consider in dismissing a prior strike, and appropriately and methodically applied the factors as outlined in *Williams*.

This is not the extraordinary case that *Carmony* posited. The record demonstrated that defendant has been unable to conform his conduct to the requirements of the law. Defendant's criminal history was extensive and serious. Defendant committed his first offense as early as 1981, resulting in a juvenile petition alleging burglary and grand theft. The petition was sustained and defendant was committed to juvenile hall. Then in 1987, defendant was convicted of grand theft and arson. Defendant was granted probation; he violated the probation terms and probation was revoked. In 1989, defendant was convicted of misdemeanor possession of drug paraphernalia. Defendant was granted probation. Within two weeks of that offense, defendant was convicted of misdemeanor disorderly conduct and served jail time. In 1991, defendant was sentenced to prison for two years as a result of a felony burglary conviction. Two months after, he was convicted of misdemeanor drug use and sentenced to 180 days of jail time. Defendant's criminal behavior escalated in 1992 when he was convicted of robbery, evading a peace officer, and being a felon in possession of a firearm. For these offenses, defendant was sentenced to a 10-year prison term. While on parole, defendant violated his parole 13

times in the 10-years spanning 1998 through 2008. Moreover, in 2001, defendant was convicted of vehicle theft and was sentenced to a four-year term in prison.

People v. Philpot (2004) 122 Cal.App.4th 893 (Fourth Dist., Div. Two) (*Philpot*), is instructive. In *Philpot*, after considering the defendant's criminal history and arguments that the lower court had erred in refusing to strike a prior conviction, we affirmed, and stated:

"Although defendant points out his personal background and the remoteness of his priors, the court could not overlook the fact defendant consistently committed criminal offenses for the past 20 years. His conduct as a whole was a strong indication of unwillingness or inability to comply with the law. It is clear from the record that prior rehabilitative efforts have been unsuccessful for defendant. Indeed, defendant's prospects for the future look no better than the past, in light of defendant's record of prior offense and reoffense and his underlying drug addiction. There is no indication from the record here that the court failed to consider the relevant factors or that it abused its discretion in determining that, as a flagrant recidivist, defendant was not outside the spirit of the three strikes law." (*Philpot, supra,* 122 Cal.App.4th at pp. 906-907.)

Similarly, in this case, defendant has chosen to proceed on a path of unlawfulness. His conduct in failing to conform to the law has been consistent; he has committed serious and violent offenses, and has refused to avail himself to the opportunities for reform. Defendant falls far short of showing that his case is extraordinary in the sense

that he, "a flagrant recidivist," falls outside the spirit of the three strikes law. (*Philpot, supra,* 122 Cal.App.4th at p. 907.)

Indeed, defendant appears to be "an exemplar of the 'revolving door' career criminal to whom the Three Strikes law is addressed." (*People v. Stone* (1999) 75 Cal.App.4th 707, 717.) Thus, given defendant's continuous criminal history, his numerous parole and probation violations, the seriousness of the past and present offenses, and his seemingly dim prospects for rehabilitation and lack of meaningful crime-free periods, we cannot say that the trial court abused its discretion when it declined to dismiss one or more of defendant's prior strike convictions. The trial court's decision not to strike defendant's priors was neither irrational nor arbitrary.

Defendant does not dispute his criminal history, and this history depicts a "revolving door" career criminal who "cannot be deemed outside the spirit of the Three Strikes law." (*Williams, supra,* 17 Cal.4th at p. 163.) While we recognize that defendant's recidivist status is not singularly dispositive, it is "'undeniably relevant.'" (*People v. Garcia, supra,* 20 Cal.4th at p. 501.)

In short, defendant was within the spirit of the three strikes law (see *Williams, supra*, 17 Cal.4th at p. 161), the trial court did not rule in an "arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice" (*People v. Jordan* (1986) 42 Cal.3d 308, 316), and we find no abuse of discretion (see *Romero, supra,* 13 Cal.4th at p. 504).

B. Cruel and Unusual Punishment

Defendant contends that imposition of a 28 years-to-life sentence for a second degree commercial burglary offense violates federal and state constitutional provisions against cruel and unusual punishment. Assuming, without deciding, that defendant preserved this issue for review, we disagree.

Under the state constitutional standard, "'"[t]o determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. [Citation.] If the court concludes that the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' [citation], or, stated another way, that the punishment '"'shocks the conscience and offends fundamental notions of human dignity'"' [citation], the court must invalidate the sentence as unconstitutional." [Citation.]' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1099.)

"'Our Supreme Court has emphasized "the considerable burden a defendant must overcome in challenging a penalty as cruel or unusual. The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature. Perhaps foremost among these are the definition of crime and the determination of punishment.

While these intrinsically legislative functions are circumscribed by the constitutional limits of article I, section 17 [of the California Constitution], the validity of enactments will not be questioned 'unless their unconstitutionality clearly, positively, and unmistakably appears.'" [Citation.]' [Citation.]" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 569.)

"'Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment.' [Citation.]" (*People v. Em* (2009) 171 Cal.App.4th 964, 971.)

"In examining whether a sentence is cruel and unusual under California law, this court: (1) examines the 'nature of the offense and/or the offender, with particular regard to the degree of danger both present to society' [citation]; (2) compares the challenged punishment with punishments prescribed for more serious offenses in the same jurisdiction; and (3) compares the challenged punishment with punishments prescribed for the same offense in other jurisdictions [citation]." (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1337 [Fourth Dist., Div. Two] (*Cline*).) As mentioned previously, "[d]efendant must overcome a 'considerable burden' to show the sentence is disproportionate to his level of culpability. [Citation.] Therefore, '[f]indings of disproportionality have occurred with exquisite rarity in the case law.' [Citation.]" (*People v. Em*, *supra*, 171 Cal.App.4th at p. 972.)

It is permissible to base the determination of whether punishment is cruel and unusual solely on the offense and the offender. (*People v. Ayon* (1996) 46 Cal.App.4th

385, 399, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10; see, e.g., *People v. Young* (1992) 11 Cal.App.4th 1299, 1308-1311; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1198-1200.)

Defendant essentially argues his sentence is cruel or unusual under the California Constitution because his current crime was nonviolent. Defendant's claim that his three-strikes punishment is disproportionate to the circumstances of the offenses and the offender is without merit. Although defendant characterizes his offenses as nonviolent, his sentence was not calculated merely on the basis of his current offenses, but on the basis of his recidivist behavior. (*Cline*, *supra*, 60 Cal.App.4th at p. 1338.)

Here, the characteristic of both the offense and the offender is recidivism. Defendant has a lengthy criminal history, as described in detail above. A sentence of 28 years to life (25 years to life for the current offense, plus a one-year term for each of defendant's three prior convictions in 1991, 1992, and 2001) based on such recidivism is not unconstitutional. (*People v. Stone*, *supra*, 75 Cal.App.4th at p. 715; accord, *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1512 (*Martinez*); *Cline*, *supra*, 60 Cal.App.4th at pp. 1337-1338.) This is true even where the present offenses are technically nonviolent. (*Cline*, at pp. 1337-1338.)

What defendant considers mitigating factors do not warrant leniency in this case. Defendant's lengthy criminal record, including his parole and probation violations, reveals he is a recidivist who has resisted prior efforts at rehabilitation. Although there was no violence involved in the current offense, "society's interest in deterring criminal

conduct or punishing criminals is not always determined by the presence or absence of violence. [Citations.]" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 826 (*Cooper*).) Finally, "drug addiction is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment." (*Martinez*, *supra*, 71 Cal.App.4th at p. 1511.) "[Defendant] . . . was before the trial court as a career criminal who had preyed on society and failed to benefit from multiple incarcerations and periods of parole . . . ." (*People v. Ayon*, *supra*, 46 Cal.App.4th at p. 400.) A sentence of 28 years to life was not disproportionate to this particular offense and offender.

Where the punishment is proportionate to the defendant's personal culpability, there is no requirement that it be proportionate to other similar cases. (*People v. Webb* (1993) 6 Cal.4th 494, 536.) Because intercase proportionality is not required to avoid the infliction of cruel or unusual punishment (*People v. Crittenden* (1994) 9 Cal.4th 83, 156), we address the second and third prongs in *In re Lynch* (1972) 8 Cal.3d 410 only briefly.

As to the relative punishment for offenses in California, defendant's sentence is not unlike others imposed under the three strikes law that have repeatedly been upheld by the courts. (See, e.g., *People v. Romero* (2002) 99 Cal.App.4th 1418, 1431-1433 [Fourth Dist., Div. Two] [sentence of 25 years to life imposed for third strike of felony petty theft]; *People v. Goodwin* (1997) 59 Cal.App.4th 1084, 1093-1094 [sentence of 25 years to life imposed for third strike of petty theft with a prior conviction].) "[P]roportionality assumes a basis for comparison. When the fundamental nature of the offense and the offender differ, comparison for proportionality is not possible. The seriousness of the

threat a particular offense poses to society is not solely dependent on whether it involves physical injury. Consequently, the commission of a single act of murder, while heinous and severely punished, cannot be compared with the commission of multiple felonies. [Citation.]" (*Cooper, supra,* 43 Cal.App.4th at p. 826; accord, *People v. Gray* (1998) 66 Cal.App.4th 973, 993; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1137.)

Finally, regarding relative punishment in other jurisdictions, California's three strikes sentencing scheme "is consistent with the nationwide pattern of substantially increasing sentences for habitual offenders." (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1416, disapproved on another ground in *People v. Dotson* (1997) 16 Cal.4th 547, 559-560 & fn. 8; accord, *People v. Ruiz* (1996) 44 Cal.App.4th 1653, 1665; *Cline, supra,* 60 Cal.App.4th at p. 1338.)

The penalty imposed here is not so substantially harsher than that imposed in other states as to call its validity into question. That some other jurisdictions may impose shorter terms for recidivists like defendant does not render his sentence disproportionate to his criminal status. "[T]he needs and concerns of a particular state may induce it to treat certain crimes or particular repeat offenders more severely than any other state. Nothing in the prohibition against cruel or unusual punishment per se disables a state from responding to changed social conditions and increasing the severity with which it treats its recidivist felons." (*Cooper, supra,* 43 Cal.App.4th at p. 827.)

The fact "[t]hat California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state

constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require 'conforming our Penal Code to the "majority rule" or the least common denominator of penalties nationwide.' [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct." (*Martinez, supra*, 71 Cal.App.4th at p. 1516.)

Defendant also argues his sentence violates the federal prohibition against cruel and unusual punishment, discussing the same three-part analysis applicable under the California Constitution. We would not reach a different result under the federal Constitution. The hurdles defendant must surmount to demonstrate cruel and unusual punishment under the federal Constitution are, if anything, higher than under the state Constitution. (See generally *Cooper, supra*, 43 Cal.App.4th at pp. 819-825.) "The Eighth Amendment [to the United States Constitution], which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" (*Ewing v. California* (2003) 538 U.S. 11, 20.) This principle is "applicable only in the 'exceedingly rare' and 'extreme' case." (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73.)

"[T]he principles developed by our court [regarding cruel or unusual punishment] are similar to those developed by the United States Supreme Court. [Citation.] . . . [T]he federal high court's reminder that appellate courts, 'of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes[.]' [Citation.]" (*People v. Barrera* (1993) 14

Cal.App.4th 1555, 1566, fn. 7.) "In weighing the gravity of [defendant's] offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions." (*Ewing v. California*, *supra*, 538 U.S. at p. 29 [sentence of 25 years to life imposed on a third-strike offender who stole three golf clubs does not violate the Eighth Amendment's prohibition against cruel and unusual punishment]; see also *Lockyer v. Andrade*, *supra*, 538 U.S. 63 [two consecutive sentences of 25 years to life imposed on a third-strike offender who stole about $150 worth of videotapes in two separate incidents not cruel and unusual punishment]; *Rummel v. Estelle* (1980) 445 U.S. 263, 268-286 [the Supreme Court upheld a sentence under a Texas recidivist statute of life with the possibility of parole for obtaining $120.75 by false pretenses, even where the defendant's previous offenses consisted of fraudulent use of a credit card to obtain goods and services worth $80 and passing a forged check in the amount of $28.36].) A fortiori, defendant's sentence is permissible under these circumstances.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
J.

We concur:

/s/ Ramirez
P.J.

/s/ Richli
J.